Supreme Court, U.S.
FILED
07-596 JUN 21 2007
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No.

IN THE SUPREME COURT OF THE UNITED STATES

Dr. Reginald D. Sevayega- Petitioner

v.

Reginald Wilkerson- Respondent

On Petition for Writ of Certiorari

To the United States Court of Appeals

For the Sixth Circuit

Petition for Writ of Certiorari

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3. Did the Sixth Circuit Court of Appeals conflict with this Court's holding in *Kyles v Whitley* and deny the petitioner due process of law when it failed to review a *Brady* claim collectively, rather than item-by-item?

4. Whether this Court's holdings in Schlup and Townsend conflict in application and results.

PARTIES TO THE PROCEEDING

The Petitioner, Dr. Reginald D. Sevayega, and Reginald Wilkerson, et. al. are the only parties involved in this action.

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OPINION BELOW

On October 27, 2005, the Magistrate Judge Patricia Hemann, without hearing, issued her 'Report and Recommendation' recommending denial of the petition for habeas corpus relief. [Case No. 1-05CV1059] On February 3, 2006, the district court judge, Peter Economus, adopting the magistrate judge's report, dismissed the case and denied issuance of a certificate of appealability. On October 25, 2006. the Sixth Circuit Court of Appeals denied the petition for certificate of appealability. No. 06-3503. On March 26, 2007, the Court of Appeals for the Sixth Circuit denied petition for rehearing.

JURISDICTION

. The opinion of the United States Court of Appeals for the Sixth Circuit denying a certificate of appealability was issued without opinion on October 25, 2006.(Appx. B) The Court of Appeals' order denying Petitioners petition for rehearing en banc was issued without comment on March 26,

2007.(Appx..1).The petitioner timely requests writ of certiorari on June 20, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2106

28 U.S.C. § 2254

O.R.C. 2953.21

REASONS FOR GRANTING THE WRIT

This case is about *actual innocence*. It asks, once again, the question broached by Judge Friendly in his brilliant treatise, "is innocence irrelevant?" ("Is Innocence Irrelevant? Collateral Attack on Criminal Judgments", 38 U. Chi. L. Rev. 142, 160 (1970)) With a continued abiding respect for the law, but disillusioned and traumatized by it, the petitioner submits that this case fits within the 'narrow class of cases... implicating a fundamental miscarriage of justice.' *Schlup v Delo*, 513 U.S. 298, 315, 115 S. Ct. 861.

The ends of justice are especially offended when a man is tried, convicted and imprisoned with literally no evidence.

The Second Circuit Court of Appeals has said that "to jail a man convicted without evidence is to impose 'involuntary servitude' which except for punishment for a crime, the Thirteenth Amendment forbids." *United States ex. rel. Caminito v Murphy*, C.A.N.Y., 1955, 222 F. 2d 698, 700, certiorari denied, 78 S. Ct. 155, 350 U.S. 896, 100 L. Ed. 788. To that degree, this is technically a case about slavery.

1. A writ of certiorari is especially recommended when a court of appeals has entered a decision which conflicts with this Court's decision in *Schlup v Delo*, 513 U.S. 298, and every other circuit, which resulted in the imprisonment of one who is *actually innocent*.

2. A writ of certiorari is recommended when a court of appeals has entered a decision which conflicts with this Court's decision in *Townsend v Sain*, 372 U.S. 293 and every other circuit that has considered the issue.

3. A writ of certiorari is recommended when a court of appeals has entered a decision which conflicts with this Court's decision in *Kyles v Whitley*, 514 U.S.419

This case is even more remarkable by virtue of the fact that in the process of denying an adequate hearing, this Court's precedents in *Schlup*, *Townsend* and *Kyles* were ignored in both the state and federal courts. The petitioner urges the Court to agree with the Second Circuit Court of Appeals that "[s]erious constitutional questions would arise if a person who could prove his actual innocence on the existing record and could not have effectively raised his claim of innocence at an earlier time had no access to judicial review." *Triestman v United States*, 124 F. 3d 361, 363 (2nd Cir. 1997) He urges this Court to agree with him that *injustice done in the name of justice is the greatest injustice of all.*

SUMMARY OF THE ARGUMENT

This case is best understood by considering: (1) the 'Duke-lacrosse incident', (2) *Buckley v Fitzsimmons* and (3) *Richter v Bartee*. It has elements of the 'Duke-lacrosse incident' by virtue of its being predicated upon an unsubstantiated claim of the putative rape victim and the

Nifongian ambition of a prosecutor. Despite being aware that the alleged victim had proffered four different locations for an alleged single event- two which were nonexistent- the prosecutor brought charges. Surely, with no physical evidence or witnesses, the defendant's having four alibi witnesses and an alleged victim claiming four different locations for the alleged rape, the calculus shifted in favor of the suspect. *Reid v State of New Hampshire*, 56 F. 3d 332, 341 (1st Cir. 1995). The police and prosecutors had no reason to believe that Figueroa was telling the truth. See *Tangwell v Stuckey*, 135 F. 3d 510, 519 (7th Cir. 1998)

The case next resembles *Buckley v Fitzsimmons*, 509 U.S. 259, by virtue of the prosecutor, finding himself with multiple locations claimed as the situs, had the Director of Security of the College select a more plausible location. With testimony citing a fifth location at trial, the prosecutors certainly knew that Figueroa's testimony was not true.

Finally, this case is a mirror image of *Richter v Bartee*, 973 F. Supp. 1118, by virtue of Brent Richter's having been

convicted of raping Denise Juve despite there having been no corroborating evidence. Subsequent to trial, in another incident in Lenexa, Kansas, Juve accused another man of having raped her. This time, however, finding no evidence, Sergeant Ogilvie confronted her and she changed the location of the claimed crime. He dropped the case and notified the Nebraska authorities and a federal district judge, reviewing the case, applied *Schlup* and ruled that Juve's credibility was severely damaged and that Richter had met the burden of production to present his evidence of actual innocence.

In the cause before this Court, both the State-court and the District Court failed to acknowledge *Schlup* or review the transcripts to assure that the findings of fact were correct. (*Paxton v McGranahan* (1985) 25 OBR 352, 355-56 Eighth District Court of Appeals, Cuyahoga County) The District Court was under a similar mandate, (*Nash v Eberlin*, 437 F. 3d 519, 524 (6th Cir. 2006)) Both failed to make a probabilistic determination as to what reasonable jurors would do. The petitioner urges the Court to recognize that

the State should not be rewarded for hiding the ball and the courts below for failing to allow hearings to develop the facts or failing to comply with *Schlup*.

ARGUMENT

I. Did the Sixth Circuit Court of Appeals err in concluding that this Court's precedent in *Schlup v Delo* was superseded by the Anti-Terrorism Effective Death Penalty Act (AEDPA) and is inapplicable to state courts?

In the instant cause before the Court, reasonable minds can agree that due process is especially offended in the case of an innocent man when it is not that his petition for habeas corpus relief was read and deemed frivolous, but rather that it was deemed frivolous and never read. The evidence herein clearly establishes that the district court's decision, later upheld by the Sixth Circuit Court of Appeals, totally abandoned the standard enunciated by this Court in *Schlup* and *House*.

Considering the instant case in which the petitioner advanced an *actual innocence* claim, the district court concluded; [Appx. 4, Report, at . 25, n.6]

> Petitioner's reliance on *Schlup v Delo*, 513 U.S. 298 (1995), to the contrary is misguided. *Schlup* was decided in 1995. The Anti-terrorism and Effective Death Penalty Act ("AEDPA"), which imposed the current requirements for successive petitions, took effect in April 1996. Thus, the AEDPA superseded *Schlup* on this point. Moreover, Sevayega mistakenly attempts to apply *Schlup* to state court proceedings. *Schlup* is relevant only to federal petitions for a writ of habeas corpus. As we noted earlier, Ohio's action in habeas and federal habeas remedy are entirely distinct, and caselaw relevant to one is not relevant to the other.

It is readily apparent that the district court's conclusion that *Schlup* was superseded by the AEDPA and not applicable to state courts was clearly erroneous. This Court cited *Schlup* in its holdings subsequent to the effective date of AEDPA in *House v Bell*, 126 S. Ct. 2064, 2066 which is controlling. The court below ignored *Schlup* and *House* as though this Court's holdings were of no account. Surely, the case deserves, as a matter of law, to be reversed.

The Court's intervention is also invited in light of the court below having rendered a judgment which is in conflict with every other circuit. In the other circuits, each and every one has cited *Schlup*. See *Santero v United States,* No. 98-

2007 (1st Cir. 1998); *Whitley v Senkowski* (2nd Cir. 2003) 317 F. 3d 223; *Lambert v Blackwell*, 164 F. 3d 621 (3d Cir. 1997); *United States v Hillary* (4th Cir. 1999) No. 99-6126; *United States v Sorrells*, 146 F. 3d 744 (5th Cir 1998) *Haynes v Battaglia* (7th Cir. 2005), 403 F. 3d 935; 939-40 *Cornell v Nix*, 119 F. 3d 1329, 1333-34 (8th Cir. 1997); *Van Buskirk v Baldwin*, 265 F. 3d 1080, 1082-83 (9th Cir. 2001); *Sellers v Ward*, 136 F. 3d 1338, 1339 (10th Cir. 1998); *Tannenbaum v United States*, (11th Cir. 1998) 148 F. 3d 1262 and *U.S.A. v Maurice* (D.C. Circuit 2001) No.00-3033. It is readily apparent that the Sixth Circuit ruling is in conflict with all the other circuit courts of appeals and should not be allowed to stand..

The district court erroneously claimed that this Court's ruling in *Schlup v Delo* was not applicable in state courts. As a matter of fact, *Richter and Bartee*, cited *supra*, was an application of *Schlup* by a district court considering a procedural default in the state court. *Richter*, 973 F. Supp. at 1120. Contrary to the district court's ruling, *Schlup* has been

applied in a host of state courts. See, for example, *Ex Parte Brown*, 205 S.W. 3d 538, 544-45, (Tex. Crim. App. 2006), *State ex rel. Nixon v Jaynes*, 63 S.W. 210, 216 (Mo. Banc 2001); (The United States Supreme Court and this Court would excuse procedural default, even in the absence of cause, when claims fall within a narrow class of cases involving a fundamental miscarriage of justice. *Schlup v Delo*, 513 U.S. 298, 315, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)); *People v Pecoraro*, 175 Ill. 2d 294, 677 N.E. 2d 875, 894, (Ill. 1997)("... Assuming, without deciding, that *Schlup* should be applied in state postconviction proceedings, we note that we have in fact considered the merits of the large majority of defendant's post conviction claims and *Schlup* would require no more with respect to those claims.") *People v Reed*, 449 Mich 375, 535 N.W. 496, 504, n. 12; *Hays v State*, 132 Idaho 516, 975 P 2d 1181,1184 (Idaho App. 1999); *State v Pope*, 80 P. 3d 1232, 1239-1242 (Mont. 2003), *Boley v Cline*, 193 W. Va. 311, 456 S.E. 38, 42 (W. Va. 1995), *Jenner v Dooley*, 590 N.W. 2d 463, 471 (S.D.

1999), *Keeter v* State, 173 S.W. 3d 756, 761, n. 1 (Tex.Crim App 2005);Ex *Parte Elizonde*, 947 S.W. 2d 202, 208-209 (Tex.Cr.App. 1996) *Pellegrino v State*, 34 P. 3d 519, 537 (Nev. 2001); and *Walker v Penn* 271 Ga 609, 523 S.E. 2d 325, 327. The Sixth Circuit Court of appeals simply erred.

The holding of the Sixth Circuit Court of Appeals having denied the applicability of this Court's *Schlup* ruling after the passage of AEDPA, adherence, vis a vis. conducting the mandatory probabilistic determination, was necessarily lacking and to that degree, the ruling was contrary to this Court's holding. Consequently, the court below applied the "clear and convincing evidence" standard of *Sawyer* [Appx. 4, R&R, p. 15, n.5] rather than the "more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt" standard enunciated by *Schlup*, 513 U.S. 298, paragraph (d) of the syllabus. This is clearly contrary to *Schlup* and *House*, and therefore, should not stand.. (See *Williams v Taylor*, 529 U.S. 362,412-13.)

2. Did the Sixth Circuit Court of Appeals

conflict with this Court's holding in Townsend v Sain and Cooter & Gell v. Hartmarx and deny the petitioner due process of law when it failed to hold an evidentiary hearing as it deferred to the state court findings without independently checking the record to determine if the petitioner received a full and fair state-court evidentiary hearing which resulted in findings which were in toto erroneous?

A. The gateway claim under *Schlup* requires that the petitioner present "new reliable evidence... not presented at trial," at 324, about which they habeas corpus must assess the likely impact of "all the evidence" on reasonable jurors., *id.* at 329.

House v Bell, 126 S. Ct. 2064, 2066.

The district court, without reference to the record which would reflect the required independent inspection of the trial transcript, (See *Jones v Wood*, 114 F. 3d 1002, 1008 (9th Cir. 1997), denied that the evidence adduced to it was "newly discovered," making two claims: (1) the evidence was available as early as 1997, [Appx. 4, R&R, p. 16]; (2) the State had shared all information prior to the trial. [*id.* p. 17] The district court's failure to independently check the record placed it in conflict with every other circuit which has considered the issue. See *Alveoli v Gilmore*, 127 F. 3d 632,

633-34 (7th Cir. 1997); *Beck v Bowersox*, 257 F. 3d 900, 901-902 (8th Cir. 2001); *Jones v Wood*, 114 F. 3d 1002, 1008 (9th Cir. 1997), and *McGourik v Phillips*. 144 F. 3d 348, 362-63 (5th Cir. 1998)

The district court's argument that several documents were available in the 1997 application for postconviction relief is irrelevant to the *Schlup* standard of "new reliable evidence... not presented at trial." (a trial held in 1993)

Secondly, the district court concluded that Frank Gasper, lead prosecutor on the case, testified that at a pretrial, he read *the* entire police *report* to Rossman. [Appx. 4, R&R, p. 17] By virtue of the fact that four documents are in question, his having read *a report* means that he didn't read three other reports which would necessarily be multiple *Brady* violations. That fact notwithstanding, reviewing the documents, while referencing the actual record, easily disposes of the lower court's erroneous conclusions.

1. 'Chronology: Erma Figueroa v Dr. Reginald Sevayega' (Received October 7, 1997).

This investigative report prepared by Cuyahoga Community College investigator, Kathryn M. Hall, would have been a valuable impeachment instrument. Figueroa claimed to have been kissed after class or July 27, 1992, a week after the alleged rape. If Figueroa had been raped, she would not have been with her attacker a week later. To this extent, this mirrors *Strickler v Greene*, 527 U.S.263, in which this Court's finding that the hiding of Ann Stolzfus' description of the incident as "a trivial episode" prior to trial, and at trial as a "terrifying incident" was a *Brady* violation. So too, the inconsistencies in the instant case would be.

Also, in the College's report, Figueroa claimed to have been raped as she and the petitioner rounded a corner in a dark hallway. Ironically, the hallways in both the Humanities Building and the Arts and Music Building are straight, therefore, Figueroa claimed to have been raped in a nonexistent location. If this fact had been revealed to a jury, no reasonable juror would have found the petitioner guilty beyond a reasonable doubt and no reasonable jurist could

have confidence in the outcome of the trial.

Moreover, for *Brady* purposes, Alan Rossman, testified that he had not seen this document [PCH 28 at 25 and PCH 29 at 2-18] and that "a hallway" was inconsistent with his understanding [PCH at 19-22 and PCH 36 at 15-18] and could have altered the outcome of the trial.

2, 'Cleveland Police Department Offense/Incident Report #92081310-00' [Ex.] indicates that on August 19, 1992, detectives Mark Hastings and John Kukula received an assignment to investigate a rape reported to have occurred at 8:15 p.m. on July 20, 1992. On August 28, 1992, Irma Figueroa came to the department and made a statement that she had been raped *in the basement* of the Arts and Music Building. The Arts and Music Building doesn't have a basement. [TR. 334 at 19-23] If this second nonexistent location had been revealed to a jury, no reasonable juror would have found that the petitioner guilty beyond a reasonable doubt and no reasonable jurist could have confidence in the outcome of the trial. Again, Rossman

testified that he never saw this document [PCH 25 at 6-11 and PCH 26 at 1-9] and had no knowledge of a basement. [PCH 23 at 14-18] Gasper testified that he read only a variation of this document to Rossman.. [PCH 78 at 6-8] This would implicate *Brady* too.

3. 'Cleveland Police Department Offense/Incident Report # 92081310-01'[Ex.] would have been a valuable instrument to impeach the credibility of Detective Mark Hastings. claimed to have received the assignment on August 17, 1992, two days before the date citied in the companion police report. He claimed to have gathered a great deal of evidence and taken statements from the *victim*, suspect and witnesses (who waited around since July 20, 1992 to issue a police statement).[PCH 98 at 13-14] Clearly, Hastings created a false document .

4. 'Supplementary Report', dated 11/16/92, [Ex.]was introduced without testimony into the record on September 24, 2003 by the State [PCH 98 at 13-14] and, therefore, was undeniably "newly

discovered evidence." On page 5 of this document, the police attempted to hide the existence of 'Chronology' and 'Cleveland Police Report # 92081310-01', *supra*, by claiming "(NOTE THIS IS THIS THE SAME STATEMENT THAT VICTIM MADE: ON 8/28/92 CITED TO CPD)" (See Hastings' testimony [Tr. 342 at 3-4, Towns' testimony, Tr. 256 at 25 and Tr. 257 at 3-7) The report also names another situs, namely a second floor hallway of the Arts Building rather than Room 203 which was testified to at trial. It also indicates that Figueroa claimed that the offense was attempted rape. Of greater irony is the fact that this is the third police report generated is less than three weeks with each contradicting the other. As such, this is the blueprint for the conspiracy. The courts below did not even mention this valuable impeachment document. If the contents of this report had been revealed to a jury, no reasonable

juror would have found the petitioner guilty beyond a reasonable doubt and no reasonable jurist could have confidence in the outcome of the trial. This document surely constitutes a *Brady* violation.

B. Rather than requiring absolute certainty about guilt or innocence, a petitioner's burden at the gateway stage is to demonstrate that is more likely than not, in light of the new evidence no reasonable juror would find him guilty beyond a reasonable doubt.

The district court ruled, "This court must presume that the factual findings of state courts are correct, and Sevayega can only overcome that presumption by clear and convincing evidence.. 28 U.S.C § 2254(e)(1). Sevayega does not provide such evidence in his petition." [Appx. 4, R&R, p. 15, n.5] This ruling is contrary to this Court's holding in *House v Bell*, 126 S. Ct. 2064, 2066.

... Contrary to the State's arguments, the standard of review in two provisions of the Anti-terrorism and Effective Death Penalty Act of 1996, 28 U.S.C.§§2254(b)(2)(B)(ii) and 2054(e)(2), is inapplicable here. In addition, because of the standard does not address a "district court's independent judgment as to whether reasonable doubt exist," *Schlup, supra*, at 329, a ruling in [a petitioner's] favor does not require the showing of clear

error as to the District Court specific findings. It is with these principles in mind, that the evidence developed in [the petitioner's] federal habeas corpus proceeding should be evaluated.. Pp. 16-20.

Having applied the *clear and convincing evidence* standard of *Sawyer* rather than the *more likely than not* standard of *Carrier*, the District Court abused its discretion.

Moreover, the Eleventh Circuit Court of Appeals in its holding in *Thames v Dugger*, 848 F. 2d 149 (11th Cir. 1988) enunciated a standard later reiterated by *Beck v Bowersox*, 257 F.3d 900,901 (8th Cir. 2001) that [f]actual determinations of the state appellate court are to be accorded a presumption of correctness only to the extent that they are 'fairly supported by the record.'" See *Dickerson v State of Alabama*, 667 F. 2d 1364, 1369 (11th Cir.), *cert. denied*, 459 U.S. 878, 103 S. Ct. 173, 74 L. Ed. 2d 142 (1982) (citing 28 U.S.C. §2254 (d) (8) (1976)); *Sumner v Mata*, 449 U.S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981).

The District Court concluded that the trial court had held a hearing in denying the petition but neglected to see whether

the hearing was full and fair. At the postconviction hearing which convened on September 24, 2003, Judge McMonagle, who would eventually make a *res judicata* ruling, raised the question as to whether or not Judge Russo had already ruled on the case and said that he had not spoken to her about it. [PCH 19 at 6-12], which demonstrated that he had no grounds to rule *res judicata.* Astoundingly, he says, "I don't have any of her pleadings that were presented to her." [PCH 19 at 9-10]... "Does anyone have -- is there copies of the motion that was filed?" [PCH 19 at 13-14].

Indicating further his lack of preparation, having been alerted that the issue before the court concerned three locations claimed by the alleged victim, Judge McMonagle says, "And did it talk about the difference in the testimony of the three different areas, that was--" [PCH 19 at 20-22] Minimally, a judge should have been aware that no hearing had been held and therefore, there could have been no testimony or a ruling *on the merits.* Had Judge McMonagle read the findings of fact and conclusions of law issued by

Judge Nancy Russo, he would have recognized the fact that she mentioned only a single report and a single location. She had not complied with the collective analysis required by *Kyles* nor the findings in *State v Apanovich*, 113 Ohio App. 3d 591, 681N.E.2d 961 (Ohio App. 8 Dist. 1996)

Not having consulted the record, Judge McMonagle accepted the prosecutor's lie that Judge Russo had ruled. [PCH19 at 1-2].That he did not have the requisite preparation is further indicated by the fact that he said, "Well, I mean, if I see the pleadings, then it's all laid out there." [PCH 20 at 9-11] The record shows that the judge never reviewed the records submitted to him. He glances at Nancy Russo's opinion [PCH 92 at 10-13], seizes the line, "Well, I just looking Judge -- Judge Russo speaks strongly, on page 6, last paragraph. It says, "Petitioner offers not a scintilla of evidence for his outrageous allegation." [PCH 94 at 3-4].

Indicative of the fact that the judge refused to review the evidence in this case is that he had been informed early in the proceedings that a subpoena had been issued to Detective

Mark Hastings, but that he had not shown up. [PCH 8 at 5-8] Again, he is reminded of Defense Counsel's intention to call Detective Hastings, [PCH 102 at 9-13] but, nonetheless, he did not enforce the subpoena. It was impossible for him to know what evidence would be gleaned from Detective Hastings' testimony. This would mean that the judge's "res judicata" ruling was erroneous. This Court noted that [i]n almost every setting where the important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. e.g. *ICC v Louisville, & N.R. Co.*, 227 U.S. 88, 93-94 (1913); *Willner v Committee on Character & Fitness*, 373 U.S. 96, 103-104 (1963). Judge McMonagle claimed to have reviewed the record and dismissed the case, ruling res judicata [PCH 102-103], but it is clear that he did not recess in order to review the record and didn't have time to review the evidence item-by-item, let alone, collectively, therefore, he violated *Kyles* as well as *Schlup*.

Having adopted *in toto* the state- court's findings without

checking the record, the federal district court also failed to analyze the evidence collectively. For example, on pages 3 and 5, the District Court speaks of "the report" in the singular. In fact, the court says, "... Therefore, the *only document* at issue is the Cleveland Police Department Offense/Incident Report, dated May 1, 2003." (See Appx. 4, page 16). But that this analysis is erroneous is immediately obvious by virtue of the fact that the original investigation was made in 1992 and could not possibly bear a date of May 1, 2003. If the court reduces the evidence to that single document, it is apparent that it could not have performed the mandatory probabilistic determination of *Schlup* nor the collective, rather than item-by-item, analysis required in *Kyles* which resulted in an erroneous review of the evidence. This Court has ruled that "a district court would necessarily abuse its discretion, if it based its ruling on an erroneous view of the law or clearly erroneous assessment of the evidence." *Cooter & Gell v Hartmarx*, 496 U.S. 384, 405 (1990)

the petition is ready for decision.

II.

Respondent contends that this court lacks jurisdiction to consider Sevayega's petition because (1) it is a successive petition and Sevayega has not obtained an order from the Sixth Circuit authorizing such a petition, and (2), Sevayega is not in custody pursuant to the judgment of the state court. Sevayega responds that the petition is not successive, because it raises issues not raised in the first petition, because those issues had not been heard and decided on the merits, because he relies on newly-discovered evidence, and because the issues arise from due process violations resulting from the Ohio Supreme Court's refusal to review state appellate court rulings. Sevayega also argues that because he asserts that he is innocent, his petition is not subject to the successive petition rule. Finally, simulated contends that he is in custody within the meaning of the habeas statute.

A. Whether Sevayega's petition

Title 28 USCA § 2244 (3) A) is clear and unequivocal

regarding this court's provenance to hear a second petition regarding the constitutionality of the detention are rising on the judgment of a state court: "Before a second or consistent application permitted by this section is filed in the District Court, the applicant shall move the appropriate court of appeals for order authorizing the District Court to consider the application." There are no exceptions for new claims, for unheard claims, is for newly-discovered evidence,[5] for later constitutional violations related to the challenged state court judgment, or for claims of actual innocence.[6] The failure to

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[5] In any case, Sevayega cannot rely on his assertion that he is entitled to a successive petition because his claims are based on duty-discovered evidence. As has been shown, the state courts have already determined that the evidence upon which Sevayega relies in this petition is not newly-discovered. This court must press on that the factual findings of the state courts are correct, and Sevayega can only overcome the presumption by clear and convincing evidence. 28 U.S.C. § 2254 (e) (1). Sevayega does not provide such evidence in his petition.

[6] Petitioner's reliance on *Schlup v. Delo*, 513 U.S. 298 (1995), to the contrary is misguided. *Schlup* was decided in 1995. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which imposed the current requirements for

affecting credibility take on enormous significance." *Sistrunk v Armenakis*, 271 F. 3d 1174, 1182 (9th Cir. 2001), A petitioner may pass through the *Schlup* gateway by undermining our impeaching credibility of the state's witnesses. *Gandarela v Johnson*, 275 F. 3d 744, 749 (9th Cir. 2001), *Carriger v Stewart*, 132 F. 3d 464 (9th Cir. 1997)

3. Did the Sixth Circuit Court of Appeals conflict with this Court's holding in Kyles v Whitley and deny the petitioner due process of law when it reviewed a Brady claim item-by-item rather than collectively?

The petitioner urges the Court to recognize that viewed collectively, the evidence would not engender confidence in the outcome of his trial. A jury was entitled to hear that: (1) the *victim* claimed to have been kissed a week after she claimed to have last attended class and to have been raped ; (2) the victim told Ann Bourjailly of an attempted rape [Supp. Report, Ex.8 p.5]; (3) the victim claimed to have been raped after rounding a nonexistent corner in the Humanities Building; (4) the victim claimed to have been

raped in a nonexistent basement in the Arts Building.; (5) the victim claimed to have been raped in the back of the classroom after all students left (Humanities Building, Room 211), [*Call and Post* article 10]; (6) the victim claimed to have been raped in the hallway of the Arts Building. [Supp. R., p. 3]; (7) victim testified at trial that she had been raped in a practice room of Arts Building [PCH, 37 at 1-9]; and (8) victim claimed that she had been raped in a classroom somewhere on the Cuyahoga Community College campus. [Civil Case Ex.9] This would constitute eight renditions of the alleged incident and six proffered scenes of the crime. This, of course, is absurd and no jury would find her credible, no reasonable juror would have found him guilty beyond a reasonable doubt, and certainly no jurist could have confidence in the outcome of this trial. [See J.Strong, McCormick on Evidence, (Ed. 5) Vol. I, § 34, p. 126] and (10) the petitioner passed a polygraph examination administered by the Adult Parole Authority. [Appx. 14]

4. Whether this Court's holdings in Schlup and

Townsend conflict in application and results.

The petitioner raises to the Court a quandary which he urges it to consider. In its *Schlup* ruling, the District Court was required to consider all of the evidence to evaluate whether, in light of the "newly discovered evidence" not presented at trial, a reasonable juror would have found the defendant guilty beyond a reasonable doubt." It is not the judge's personal view which the holding emphasizes, but rather it is what reasonable jurors would do. Should the petitioner meet the criterion, he or she is entitled to pass through the gateway to present his or her evidence of *actual evidence* in the district court.

Townsend, on the other hand, requires the judge to view the evidence collectively, not item-by-item, and make a determination of whether he or she can have confidence in the outcome of the trial. If not, the judge can reverse the conviction.

Clearly, operationally, in *Schlup*, the judge is asked to put himself in the mind of the reasonable juror, but in *Townsend*,

the emphasis is upon his or her own deliberations. If the judge follows the dictates of Schlup, there is yet another proceeding. If, on the other hand, *Townsend* is applied, the long and arduous trek is over and the innocent defendant is granted relief. The petitioner urges the Court to solve this tension and vindicate an innocent man.

CONCLUSION

The holdings of this Court are "clearly established Federal law [*Williams v Taylor*, 529 U.S. 362; *Wright v West*, 505 U.S. 277, 287-89] and judges are presumed to know the law and apply it when making their decisions. [*Lambrix v Singletary,* 520 U.S. 518 (1997)] When, then, the courts below severely depart, in fact abandon, the clear enunciation of the law in three precedents, their decision should not stand.

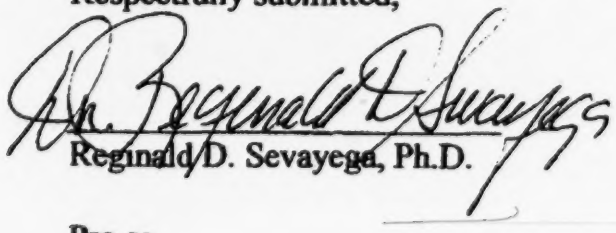
This Court has said that "[h]abeas corpus is, and has for centuries been, a 'bulwark against a conviction that violates fundamental fairness.'" *Dretke v Haley*, 541 U.S. at 398-399, 124 S. Ct. at 1855 This is especially the case in the matter of

actual innocence. In *Schlup, supra*, at 324-25, 115 S. Ct. at 866, this Court held:

> Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustices that results from the conviction of an innocent person has long been the core of the criminal justice system. That concern is reflected in the "fundamental value determination of our society that it is far worse to convict an innocent person than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372, 90 S. Ct.1068- 1077, 25 L. Ed. 2d 368 (1970) (Harlan, J. concurring). See also Starkie, Evidence 756 (1824) ("The maxim of the law is... that it is better that ninety-nine... offenders should escape, than that one innocent man should be condemned.") See generally, Newman, Beyond "Reasonable Doubt," 268 N.Y.U. Rev. 979, 980-81 (1993).

That is the essence of the cause before this Court. The petitioner urges this Court to reverse the petitioner's conviction based upon *Kyles* or to remand it to the District Court before an impartial judge pursuant to *Schlup*.

Respectfully submitted,



Reginald D. Sevayege, Ph.D.

Pro se

No. 06-3503

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REGINALD D. SEVAYEGA	)	FILED
	)	MARCH 26, 2007
Petitioner-Appellant	)	LEONARD GREEN
	)	Clerk
	)	
v.	)	ORDER
	)	
REGINALD WILKERSON, et al.,	)	
	)	
Respondents-Appellees	)	

Before: GUY, SUHRHEINRICH, and GRIFFIN, Circuit Judges,

Reginald D. Sevayega petitions for a rehearing en banc of this court's October 25, 2006, order that denied his application for a certificate of appealability. The petition was initially referred to a panel of three judges on which the original deciding judge did not sit. After review of the petition, this panel advised the Clerk of the Court of its conclusion that the original motion was properly denied. The petition was then circulated to all of the active Judges of the

Court.

No Judge having requested a vote, the petition for rehearing has been referred back to this panel for disposition, pursuant to establish court procedures. Because the panel has concluded that the original motion was properly denied, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

_____

Clerk

No. 06-3503

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REGINALD D. SEVAYEGA	)	FILED
	)	OCTOBER 25, 2006
Petitioner-Appellant	)	LEONARD GREEN,
	)	Clerk
	)	
v.	)	ORDER
	)	
REGINALD WILKERSON, et al.,	)	
	)	
Respondents-Appellees	)	

Reginald D. Sevayega, an Ohio prisoner proceeding pro se, appeals the district court's judgment dismissing his petition for a writ of habeas corpus brought under 28 U.S.C. § 2254. Sevayega's notice of appeal is construed as an application for a certificate of appeal ability. See Fed. R. App. P. 22(b)(2); *Kincaid v Sparkman*, 117 F. 3d 949, 953 (6th Cir. 1997)

To obtain a certificate of appealability, the petitioner was "demonstrat[e] that jurists of reason, could disagree with the district court's resolution of his constitutional claims that the

prosecutor engaged in misconduct, his equal protection rights were violated, he did not receive a fair and impartial trial, he is actually innocent, and his due process rights were violated multiple times.

Accordingly, Sevayega's application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

_____

Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

REGINALD D.SEVAYEGA	)	**CASE NO.**
	)	**1:05CV1059**
Petitioner-Appellant	)	
	)	**JUDGE PETER**
	)	**ECONOMUS**
v.	)	
	)	**JUDGMENT**
ADULT PAROLE	)	
AUTHORITY	)	
	)	
Respondent-Appellee	)	

For the reasons set forward in this Court's memorandum and order of this date, it is **ORDERED** that the Magistrate Judge's Report and Recommendation is **ADOPTED**; and **IT IS FURTHER ORDERED** that Petitioner's petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 is **DISMISSED**.

Finally, the Court certifies, that pursuant to 28 U.S.C. §1915 (a) (3), that an appeal from the decision cannot be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253 (c);

Fed. R. App.22(b).

IT IS SO ORDERED.

/s/ Peter C. Economus-February 3, 2006
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

REGINALD D.SEVAYEGA	)	**CASE NO.**
	)	**1:05CV1059**
Petitioner-Appellant	)	
	)	**JUDGE PETER**
	)	**ECONOMUS**
v.	)	
	)	**MEMORANDUM**
ADULT PAROLE	)	**OPINION AND**
AUTHORITY	)	**ORDER**
	)	
Respondent-Appellee	)	

On April 26, 2005, Petitioner filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging the constitutionality of his criminal conviction. This case was referred to Magistrate Judge Patricia A. Hemann for preparation of the report and recommendation pursuant to 28 U.S.C. § 636 and LR 72.2 ((2). (Dkt. #6). Respondent filed a Motion to Dismiss on September 7, 2005. (Dkt. #8), read on October 28, 2005, Magistrate Judge Hemann filed a report recommending that the Court grant Respondent's motion and

dismiss Petitioner's application for habeas corpus. (Dkt. #10]. On November 7, 2005, Petitioner filed objections to this recommendation and a Motion for Recusal of Magistrate Judge Hemann. (Dkt. #12, 13).

The Court has reviewed the report and recommendation of Magistrate Judge, *de novo*. The Court finds that the report and recommendation (Dkt. #10) is well-supported and that Petitioner's objections are without merit. Therefore, Magistrate Judge Hemann's report and recommendation is hereby **ADOPTED** and Petitioner's objections are overruled.

Accordingly, Respondent's Motion to Dismiss is **GRANTED**. Petitioner's Writ of Habeas Corpus is **DENIED** in this matter is **DISMISSED**. Petitioner's Motion for Recusal of Magistrate is therefore **MOOT**. For the mark, the court certifies, pursuant to 28 U.S.C. §1953 (a) (3), that an appeal from this decision cannot be taken in good faith, and that there is no basis upon which to issue a

certificate of appealability. 28 U.S.C. § 2253 (c); Fed. R. App. P. number 22 (b).

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IT IS SO ORDERED.

/s/ Peter C. Economus- February 3, 2006
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

REGINALD D.SEVAYEGA	CASE NO. 1:05CV1059
Petitioner-Appellant	JUDGE ECONOMUS
v.	MAGISTRATE JUDGE HEMANN
ADULT PAROLE AUTHORITY	
Respondent-Appellee	REPORT AND RECOMMENDATION Docket ##8,9

This matter is before the magistrate judge pursuant to Local Rule 72.2(b) ((2). Before the court is respondent's motion to dismiss petitioner's petition as successive. ("Resp. mot."; Docket# 8). Petitioner, Reginald D. Sevayega ("Sevayega), opposes respondent's motion and moves for summary judgment on the merits of this petition ("Pl. mot."; Docket # 9). For the reasons given below, the magistrate Judge recommends that the court grant respondent's motion to dismiss Sevayega's petition.

On December 14, 1992, the Cuyahoga County Grand Jury indicted Sevayega on one count of rape and two counts of tampering with evidence. On July 23, 1993, after a jury trial, the court said in Sevayega to seven to 25 years on the count of rape and one year of each of the counts of tampering with evidence, the latter two sentences to be served concurrently with each other and consecutively to the sentence of the count of rape.

Sevayega timely appealed his conviction to the state appellate court, raising three assignments of error:

> Assignment of Error No. 1: The appellant should be granted a new trial due to ineffective assistance of counsel.
>
> Assignment of Error No. 2: The appellate should be granted a new trial due to the lower court's error in denying defendant's motion for acquittal due to lack of evidence.
>
> Assignment of Error No. 3: Of the appellate should be granted a new trial because he was denied a fair trial due

to prosecutorial misconduct.[1]

The Court of Appeals affirmed the judgment of the trial court of September 22, 1994, denying all three grounds for relief on the merits.

Sevayega filed an appeal in the Ohio Supreme Court on November 15, 1994, raising to claims of error:

> Assignment of Error No. 1: The appellant should be granted a new trial due to ineffective assistance of counsel.
>
> Assignment of Error No. 2: Appellant should be granted a new trial due to the lower court's error in denying the defendant's motion for acquittal due to lack of evidence.

The Ohio Supreme court denied the appeal on March 1, 1995 for failure to raise a substantial constitutional question.

Sevayega filed a timely petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on June 6, 1996. In his petition, he asserted three grounds for relief:

> Ground one: The appellant should be granted a new trial because the defendant was denied a fair trial due to prosecutorial misconduct.

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[1] The third assignment of error did not appear in the brief filed by appellate counsel. It was raised in a pro se brief filed separately.

Ground two: The appellant should be granted a new trial due to ineffective assistance of counsel.

Ground three: The appellant should be granted a new child due to the lower court's error in denying the defendant's motion for acquittal due to lack of evidence.

On February 21, 1997 the court dismissed Sevayega's petition the court also found that Sevayega had not made a substantial showing of a denial of a constitutional right and denied Sevayega, a writ of appealability.

Sevayega filed a notice of appeal of the district court's decision on March 20, 1997. On September 24, 1997 the Sixth Circuit denied Sevayega's application for a certificate of appealability.

On November 21, 1997 Sevayega filed in the trial court a petition for post conviction relief;

> In his petition, he asserted that "impeachment/exculpatory." evidence had been withheld by the prosecutor at his trial. According to Sevayega, on October 2, 1997, a friend of his had gone to the Records Department of the Cleveland Police Department and discovered that the original "Offense/Incident Report" regarding his offenses was not in the file. This same friend returned to the Department on October 6, 1997, and found the report in

the file. According to Sevayega, this newly discovered report stated that the victim reported that she had been raped in the "basement of the Arts Building, " rather than in a piano practice room in the Humanities Building, and she testified at trial. Sevayega argued that the fact that the incident report was missing from the file on October 2, 1997, indicated that the prosecutor had committed a *Brady* violation in purposely withholding this document from the defense counsel at trial. Also attached to Sevayega's petition was a "Chronology" of events prepared on September 11, 1992 by Kathryn M. Hall, Director of Affirmative Action in Diversity at Tri-C. In this chronology, Hall reported that Figuera (sic) met with her and reported that Sevayega had raped her "as they rounded a dark hallway." Although Sevayega admitted in his petition that this chronology had been provided to his defense counsel prior to trial, he argued that, in conjunction with the allegedly missing police report, it indicated that the prosecutor had knowingly allowed the victim to testify falsely at trial that she had been raped in a piano practice room.

Finally, Sevayega argued that there were discrepancies on the allegedly newly discovered police report regarding the date on which Figueroa reported the rape. The report, dated 10/30/1992, stated that "on 8/19/02 received an assignment to do an investigation [of] rape that occurred at the Arts Building at Cuyahoga Community College. On 8/28/92, the victims came to the Sex Crime Unit and reported that on 7/20/92 at approx. 1015 hrs. the above-named suspect vaginally raped her in the basement of the Arts Building***." (Emphasis added). A supplemental narrative to the report, also dated 10/30/92, reported that on 8/17/92 after obtaining statements from the victim, the suspect and witnesses involved in that case, we also obtained a large amount of evidence***." (Emphasis added). Sevayega argued that the discrepancies between the dates

indicated that the prosecutor falsified the supplement a report and, further, supported his claim that the prosecutor had knowingly allowed Figueroa to present perjured testimony at trial.

State v Sevayega, 2004 WL 2891913, at *2 (Ohio App. Dec. 9, 2004).

When the trial court failed to make a ruling on Sevayega's petition within ten months, Sevayega filed a petition in the Ohio Supreme Court for a writ of mandamus to compel the trial court to issue a ruling on Sevayega's motion for post conviction relief. On September 22, 1998 the trial court denied Sevayega's petition as untimely. The trial court also looked at the merits of Sevayega's claims in the alternative. The court found as follows:

> Petitioner offers not a scintilla of evidence to prove his outrageous allegations. Even if the report was missing from the file at some point in October of 1997, this in no way suggests that the report was not in the file and available to the defense at the time of trial. Petitioner offers no evidence to support his allegations in this Court will not lead to the conclusion of misconduct by the prosecution.
>
> Assuming arguendo that the information in the report was not available to the defense at the time of trial, Petitioner's rights to due process and a fair

trial were not violated. Any internal memorandums or documentation by prosecutors or their agents, prepared in connection with the case must only be disclosed if they contain any exculpatory evidence under Crim. R. 16(B) (2).

Petitioner argues that the report in question contained exculpatory evidence. The floor of the [A]rts [B]uilding where the rape occurred is different in the report than is in other evidence placed before the court at trial. This fact, in and of itself, can hardly be seen as exculpatory. To be considered exculpatory, evidence must be of the caliber to create a strong possibility of a different result at trial. *Dayton v. Martin* (1997), 43 Ohio App. 3d 87, 539 N.E. 2d 646. Clearly, a slight discrepancy in a report does not rise to this high standard.

In *Giglio v. United States* (1972), 405 U.S. 150, 92 S. Ct. 73, 31 L. Ed. 2d 104, the Court held that due process is not violated when new evidence is discovered at the trial that may have been useful to the defense, unless the presentation of such evidence would have been likely to change the verdict at trial. Clearly, the fact that the report may mistakenly state the floor on which the rape took place does not change the overwhelming weight of the rest of the evidence presented at trial. Petitioner also points to some other small discrepancies contained in reports. None of the issues raised by Petitioner rise to the standard provided for in *Giglio*.

Sevayega, 2004 WL 2891913 at *3 "quoting the trial court).

Sevayega appealed to the trial court's dismissal of his

petition to the state appellate court. The state appellate court dismissed his appeal as untimely filed. There is no record that Sevayega appealed this judgment to the Ohio Supreme Court, nor does Sevayega alleged that he filed such an appeal.

On May 28, 1998, 1998 Sevayega moved in the federal district court to authorize the filing of a second application for habeas relief. On June 18, 1998 the court denied Sevayega's motion on the grounds that it lacked the authority to authorize a second application for habeas relief. On October 26, 1998 petitioner moved in the district court for an order to authorize a supplemental brief, and on November 12, 1998 he moved for an evidentiary hearing. The court denied these motions on November 23, 1998 and November 16, 1998, respectively.

In June 1999 Sevayega moved in the Sixth Circuit federal appeals court for an order authorizing a second or successive habeas petition. Sevayega contended in the brief accompanying his motion that new evidence established his

innocence. On June 22, 1999 the Sixth Circuit issued an order denying Sevayega's motion.

In late 1999 Sevayega filed a petition in the state appellate court for a writ of mandamus asking the court to order the custodian of the records of the Cleveland Police Department to send him copies of reports, notes, and witness statements related to the investigation leading to his conviction in 1993. The appellate court denied Sevayega's petition on November 18, 1999. He timely appealed the denial to the Ohio Supreme Court. On December 20, 1999, the Ohio Supreme Court affirmed the judgment of the appellate court. See *State ex. rel. Sevayega v. City of Cleveland*, 1999 WL 33915778 (Ohio December 20, 1999).[2]

Also in late 1989 Sevayega filed the petition in the state appellate court for a writ of mandamus to compel Dr. Frank

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[2] Sevayega also petitioned in the Ohio Supreme Court to issue a writ of mandamus in *State ex rel. Sevayega v Blackmon*, 87 Ohio St. 3d 1416, 717 N.E. 2d 1104 (1999). The Ohio Supreme court denied the petition on October 20, 1999. The gravamen of the petition is not known.

Reis, Executive Vice President, Human Resources and Personnel at Cuyahoga Community College, to send him copies of certain documents related to his 1993 conviction. The state appellate court dismissed his petition as without merit or November 29, 1999. Sevayega timely appealed to dismissal to the Ohio Supreme Court. That court dismissed Sevayega's appeal was January 12, 2000.

In early 2000 Sevayega petitioned the Ohio Supreme Court for a writ of mandamus to compel the Cuyahoga County prosecutor to send him copies of records related to his 1993 conviction. On February 2, 2000 the Ohio Supreme Court dismissed Sevayega's petition upon motion of the defendant. See *State ex rel. Sevayega v Mason*, 88 Ohio St. 3d 1411, 723 N.E. 2d 117 (2000).

Sevayega moved in 2002 in the Sixth Circuit for an order authorizing a successive habeas petition, again arguing that new evidence not disclosed by the prosecutor demonstrated that he was innocent and that his conviction was obtained through the use of fabricated evidence. The Sixth Circuit

denied Sevayega's motion on August 1, 2002.

Sevayega petitioned Ohio Supreme Court for a writ of habeas corpus pursuant to Ohio Rev. Code §2725.02. On March 5, 2003 the Ohio Supreme Court dismissed his petition. *Sevayega v Bobby*, 98 Ohio St. 3d 1472, 784 N.E. 2d 707 (2003).

On March 26, 2003 Sevayega that filed in the Mahoning County Court of Court Pleas a petition for a state writ of habeas corpus pursuant to Ohio Rev. Code §2725.02. Sevayega advanced seven propositions in support of his petition, including the discovery of new evidence, the failure of appellate counsel to argue ineffective assistance of counsel, and the failure of the Sixth Circuit Court of Appeals to apply the proper standard when reviewing his claim of actual innocence.[3] The petition was sent to the Ohio Seventh

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[3] Sevayega apparently confused Ohio's action in habeas corpus with the petition for a federal writ of habeas corpus. Both are statutory creatures with attenuated connections to the common-law action of the same name. Law applicable to the federal writ of habeas corpus has no application to

District Court of Appeals for determination of the merits. The state appellate court dismissed Sevayega's petition on November 26, 2003, finding that he had failed to file his petition in the proper court, had failed to plead jurisdictional grounds for granting the petition, and had failed to show that extraordinary circumstances justified considering nonurisdictional grounds for considering the petition. In finding that his claim of newly discovered evidence was

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Ohio's action in habeas corpus and vice versa. Ohio's habeas corpus, found at Ohio Rev. Code Ch. 2725, is largely a challenge to the jurisdiction of the sentencing court. See *State ex rel. Pirman v. Mooney*, 69 Ohio St. 3d 591, 635 N.E. 2d 26 (1994); *Stahl v. Shoemaker*, 50 Ohio St. 2d 351, 364 N.E. 2d 286 (1977). State habeas relief is available in Ohio on nonjurisdictional grounds only in certain extraordinary circumstances where there is no adequate legal remedy. *Pirman*, 69 Ohio St. 3d at 593, 635 N.E. 2d 26.

without merit, the court made the following findings:

> Petitioner also claims that there is "newly discovered evidence" that can exonerate him, namely three investigative reports that Petitioner states were deliberately withheld by the prosecution, pursuant to Crim.R. 16. In an attempt to bolster this claim, Petitioner included, among other pages of his trial transcript, page 313, where in the admissibility of certain police reports is discussed. While the conversation is presented out of context, the extent to which it is presented is sufficient to demonstrate that the reports were not "new evidence" at all, but were instead reports deemed not to be subject to discovery. Because Petitioner was aware of the existence of the reports from, at the very least, the time of trial, to label them "new evidence" is a mischaracterization.

Sevayega v Bobby, 2003 WL 22839346, at *2 (Ohio App. Nov. 26, 2003). The court also noted that it lacked jurisdiction to consider claims that a federal court had erred.

In May 2003 Sevayega filed a second petition for post conviction relief in the trial court. The state appellate court, which heard his appeal of the denial of his petition described Sevayega's petition in the trial court's decision as follows:

> In his petition he argued that:
>
> "[T]he postconviction trial judge abused her discretion in denying his petition when she (1) based her decision upon an erroneous view of the facts and the law; [2] failed to comport with the Supreme Court precedent when

considering a claim of 'actual innocence'; (3) failed to comply with the mandates of R.C. 2953.21; and (4) failed to be impartial in the proceedings." He then offered 14 specific reasons regarding how the trial judge had allegedly abused her discretion in denying his petition.

The gist of Sevayega's second petition, however, was that the trial court erred in denying his petition because he was not informed by the prosecutor prior to trial of the various discrepancies in the victim's statements regarding where the rape occurred or of alleged discrepancies on the police reports regarding when the rape was investigated by the police or reported by the victim. According to Sevayega, this information was exculpatory and also could have been used to impeach Figueroa's testimony at trial.

Attached to Sevayega's petition were the same documents that had been attached to in the first petition, as well as (1), a Cleveland Police Department. Offense/Incident Report, dated May 1, 2003, regarding the rape investigation; (2) a copy of a civil lawsuit filed against Sevayega and Tri-C by Figueroa on July 19, 1993; and (3) a 1992 article from The Call and Post Newspaper reporting on Sevayega's arrest in stating that the victim and legs that see me again, raped her in "the classroom after other students had left."

Sevayega, 2004 WL2891913, at *3-4. The trial court held a hearing regarding Sevayega.'s claims and after consideration, denied the petition.

Sevayega appealed the denial of his petition for post-conviction release of the state appellate court. Sevayega

asserted a single assignment of error in the appellate court, claiming that the trial court erred in denying the second petition of postconviction relief. The appellate court made the following findings in reviewing Sevayega's appeal:

A trial court's ability to review successive postconviction petitions, while pursuant to R.C. 2953.23 (A):

"[A] court may not entertain *** a second petition or successive petitions for similar relief on behalf of a petitioner unless***:

(1), both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A) (2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petitioner asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, a reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted***."

Accordingly, in addressing Sevayega's petition., we

must first determine whether he set forth sufficient grounds to allow the trial court to entertain his successor petition. Sevayega must show that he was "unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief." [FN1], and that, but for the constitutional error, he would not have been found guilty. Sevayega's petition fails on both prongs.

FN1. He does not contend that a newly recognized constitutional right gives him standing to raise his successor petition.

First, Sevayega has not demonstrated that he was "unavoidably prevented" from discovery of the documents attached to his petition. Most of the documents were attached to his first petition; obviously, therefore, they were available to him as early as 1997. With respect to the three new documents attached to his second petition, Sevayega was clearly not prevented from discovering the 1992 Call and Post article nor the civil lawsuit filed against him by Figueroa before he filed his first petition propose commission released In 1997. Therefore, the only documented issue is the Cleveland Police Department Offense/Incident Report dated May 1, 2003. This document contains the same narrative as that of the original Offense/Incident Report, which was attached Sevayega's first petition. Accordingly, the document offers nothing new to support Sevayega's petition.

Even assuming, however, for the sake of argument, that Sevayega was unavoidably prevented from discovering the documents attached to his petition, you must also show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty." R.C. 29053 .23 (sic.)(A)(1)(b). Sevayega alleges denial of his right to due process and a fair trial based on the prosecution's alleged failure to

disclose exculpatory evidence as required by *Brady v Maryland* (1963), 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, and its progeny. *Brady* held, "the suppression by the prosecution of evidence favorable to is accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id, at 87.

We find no merit to Sevayega's argument. First, we are not persuaded that the prosecutor withheld any documents from defense counsel or allowed Figueroa to present perjured testimony. Frank Gasper, lead prosecutor on the case, testified at a hearing regarding Sevayega's second petition that in a pretrial, he read the entire police report to Alan Rossman, defense counsel, as was his usual practice and the policy of the Major Trials Unit. He testified further that he recognized there were discrepancies in Figueroa's initial statement to the police that the rape occurred in the basement of the Arts Building in a subsequent statement that it occurred in a piano room of the Humanities Building. Gasper testified that he gave Figueroa's statement to Rossman to read at a pretrial. He testified further that because he believed Figueroa was confused about where the rape occurred, he instructed the detectives to meet Figueroa at the college and take photographs where she determined the rape occurred. Gasper then gave copies of the photographs to Rossman. Gasper also testified that he was particularly careful in the way he handled discovery of this case because Sevayega's mother was a friend of Stephanie Tubbs Jones, Cuyahoga County Prosecutor at the time, and she was concerned about the case.

Alan Rossman testified that he was aware at trial of inconsistencies in Figueroa's various statements regarding where the rape occurred and, further that he cross examined both her and Detective Hastings, one of the detectives who

investigated the crime, about these inconsistencies. He testified further that he had read the written statement. Figueroa had given to Detective Hastings on August 28, 1992. In that statement, Detective Hastings specifically asked Figueroa, "tell me in your own words, what exactly happened to you on 7/20/92 in approximately 2015 hours while you were in the Arts Building of Cuyahoga Community College." She responded, "I think it was the Arts Building, but the campus is big and I get mixed up." Furthermore, in the statement, she reported that Sevayega grabbed her, pushed up against the wall and then raped her, but did not mention the piano practice room. Thus, contrary to Sevayega's argument, defense counsel was aware prior to trial that Figueroa had changed her story regarding where the rape occurred and he cross-examined her regarding the inconsistency in her story.

Moreover, due process is not violated when new evidence that may have been useful to the defense is discovered after trial, unless the presentation of such evidence would have been likely to change the verdict in the trial. See *Giglio v United States* (1972), 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104. The evidence against Sevayega at trial was overwhelming. In light of the overwhelming evidence against him, he has not demonstrated, by clear and convincing evidence, that the discrepancies in the report were mercurial to the jury's verdict, nor that they "in any reasonable likelihood [would] have affected the judgment of the jury." Id..

Finally, Sevayega's claims are barred by the doctrine of res judicata. As this court stated in *State v Apanovich* (1995), 107 Ohio App. 3d 82, 89, 667 N.E. 2d 1041, "res judicata may be applied to petitions, which raise issues of on the same facts or newly discovered evidence."

Here, it is apparent that Sevayega's second petition raises the exact same issues raised in the first petition.

Moreover, it is apparent from the trial court's opinion quoted above that the trial court, a ruling on his first petition, express to consider these issues. Accordingly, his petition is barred by the principles of res judicata.

Sevayega contends that res judicata should not apply in this instance, however, because his first petition was filed pro se. This court considered and rejected the same argument, however, in *State v Adamson* (Mar. 23, 1995), Cuyahoga App. No. 67187, where we stated:

"A petition for post conviction relief is a civil proceeding. No constitutional right to counsel exists in a postconviction proceeding. We find no reason preclude the application of res judicata because it petitioner in a civil proceeding without the right to counsel active pro so (sic) This is especially true where, as here, the planes were actually raise in the earlier petition."

As in *Adamson*, all of the claims raised in Sevayega's second petition for raised in the first petition. Accordingly, the second petition is barred by res judicata.

Because Sevayega failed to demonstrate, as required by R.C. 2903.23 (A), that he was unavoidably prevented from discovery of the facts upon which he relied to present his claim and that no reasonable factfinder would have found him guilty of the offense, and, further, because his petition is barred by res judicata, the trial court properly denied his second petition for post conviction relief.

Sevayega, 2004 WL 2891913 at *4-6. The state appellate court overruled Sevayega's assignment of error. On December 9, 2004. There is no record that Sevayega

appealed this decision to the Ohio Supreme Court, nor does he alleged that he did so. See Pet. .mot at 5-6.

In July 2003 the trial court held a hearing regarding the recommendation of the Ohio Department of Rehabilitation and Correction that Sevayega be classified as a sexual predator. The hearing presented testimony from five women that Sevayega had sexually harassed them. It also heard testimony from a police detective and a licensed clinical counselor. After considering the evidence the trial court determined that Sevayega was a sexual predator.

Sevayega filed that timely notice of appeal in the state appellate court challenging the trial court's determination that he was a sexual predator. Sevayega asserted two assignments of error in his appellate brief:

> The court erred by overruling appellant's motion to stay proceedings pending the resolution of the appellant's petition for post-conviction relief.
>
> The evidence was insufficient, as a matter of law, two by clear and convincing evidence that appellant is likely to engage in the future in one or more sexually oriented offenses.

The state appellate court overruled Sevayega's assignments of error and affirmed the judgment of the trial court on September 16, 2004. *State v. Sevayega*, 2004 WL 2071417 (Ohio App. Sept. 16, 2004).

Sevayega filed his current petition for a writ of habeas corpus, on April 26, 2005. He asserts six grounds for relief in his petition.[4]

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[4] Pl. mot. States that the grounds of Sevayega's petition are as follows:

> 1 State withheld evidence that putative victim had proffered four different locations for alleged rape (2 nonexistent), concocted a fifth location with evidence and testimony known to be false at the time of trial, resulting in conviction of one who is actually innocent.
>
> 2 In 1997, petitioner offered two (2) conflicting police reports affecting credibility of "victim" and investigating officer, but post conviction court ignored Ohio statute and Supreme Court precedent and adopted State's inapposite findings which distorted trial record and preventing their appellate review. Additionally, court failed to comport to U.S. Supreme Court precedent for handling claims of "actual innocence."
>
> 3. Petitioner denied due process when after filing claims of misconduct by police and prosecutors, and abuse of discretion by post conviction court, the petitioner was

1. The Petitioner was denied equal protection of the law when the trial court failed to comport with state statute, Ohio Supreme Court precedent and the law of the district when it arbitrarily designated him a predator when others similarly situated were not.

2. Judge Russo denied the Petitioner due process when

---

subjected to a perfunctory predator classification hearing in which court ignored predictive evaluation of court clinic predicting 6-7 recidivism rate. Court ignored Supreme Court precedent directly on point.

4. Newly discovered evidence gathered in 1997 and 2003 offer incontrovertible evidence that police produce for false police reports, prosecutors withheld evidence that putative victim had proffered four siti for the alleged crime, an State presented false evidence and testimony about this location at trial.

Pl. mot. at 6.

she failed to comply with O.R.C. 2953.21, [sic] the post conviction statute, requiring a hearing on substantive grounds for relief not negated by the records.

3. Judge Russo failed to know and comply with the statute and maintain impartiality when she neglected to consider the evidence and grant summary judgment on the petition's evidence.

4. The trial judge abused her discretion when she adopted the State's findings verbatim without thoroughly checking the record to determine whether those findings were true.

5. The Petitioner was denied due process of law. When the post conviction court failed to apply the probabilistic calculus required by the U.S. Supreme Court in *Schlup.*

[6]. The Petitioner's right to due process and equal protection for violated when they State's attorney, conspired with college officials to deprive the petitioner of his profession and his freedom.

Responded filed a motion to dismiss on September 7, 2005. Petitioner filed a motion for summary judgment in which he opposes respondent's motion on September 16, 2002. Thus, the petition is ready for decision.

II.

Respondent contends that this court lacks jurisdiction to consider Sevayega's petition because (1) it is a successive

Court, the applicant shall move the appropriate court of appeals for order authorizing the District Court to consider the application." There are no exceptions for new claims, for unheard claims, is for newly-discovered evidence,[5] for later constitutional violations related to the challenged state court judgment, or for claims of actual innocence.[6] The failure to obtain permission from the circuit court to file a successive

---

[5] In any case, Sevayega cannot rely on his assertion that he is entitled to a successive petition because his claims are based on duty-discovered evidence. As has been shown, the state courts have already determined that the evidence upon which Sevayega relies in this petition is not newly-discovered. This court must press on that the factual findings of the state courts are correct, and Sevayega can only overcome the presumption by clear and convincing evidence. 28 U.S.C. § 2254 (e) (1). Sevayega does not provide such evidence in his petition.

[6] Petitioner's reliance on *Schlup v. Delo*, 513 U.S. 298 (1995), to the contrary is misguided. *Schlup* was decided in 1995. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which imposed the current requirements for successive petitions, took effect in April 1996. Thus, the AEDPA superseded *Schlup* on this point. Moreover, Sevayega mistakenly attempts to apply *Schlup* to state court proceedings. *Schlup* is relevant only to federal petitions for a writ of habeas corpus. As was noted earlier, Ohio's action in habeas and federal habeas remedy are entirely distinct, and case law relevant to one is not relevant to the other.

habeas statute

Respondent argues that Sevayega is not in custody as he had already been released from prison when he filed his habeas petition. Sevayega asserts that he was still in custody when he filed his petition because he was on parole at the time.

A federal court has jurisdiction to consider a petition for a writ of habeas corpus only when the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254. The custody requirement does not necessitate that a petitioner "be physically confined in order to challenge his sentence on habeas corpus." *Maleng v. Cook*, 490 U.S. 488,491 (1989). Imposition of parole subsequent to serving a term of imprisonment is sufficiently "custody" within the meaning of the habeas statute to gives a district court jurisdiction over a habeas petition. *Jones v. Cunningham*, 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963); *McVeigh v. Smith*, 872 F. 2d 725 (6th Cir. 1989). Moreover, once jurisdiction has attached at the time the

petition was filed, the expiration of parole does not moot the petition. The collateral consequences of the petitioner's conviction are sufficient to prevent the petition from dismissal as moot. *Yoder v. Celebezze*, 856 F. 2d 197 (6th Cir. 1988).

Sevayega has already been released from imprisonment arising from his 1993 conviction at the time he filed this petition. He was, however, on parole at the time of filing. He was released from parole April 26, 2005, three days after filing the petition. The restrictions imposed by Sevayega's parole at the time he filed his petition would have been sufficient to give this court jurisdiction over any grounds for relief challenging the constitutionally of his 1993 sentence (i.e., the sentence challenged by the second through sixth grounds for relief) had this court not been deprived of jurisdiction to review those claims by Sevayega's failure to obtain permission from the Sixth Circuit to file a successive petition. Further, the continuing collateral consequences of the 1993 conviction would have prevented dismissal of

grounds two through sixth because of mootness.

But Sevayega's remaining claim for relief, ground one, does not challenge the custody resulting from his 1993 conviction. His first ground for relief contends that Sevayega was denied equal protection by the court which designated him a sexual predator. This is not an attack on the 1993 sentence which resulted in Sevayega's imprisonment and parole but an attack on the proceeding which resulted in his designation as a sexual predator.

The custody requirement of the habeas statute can only be satisfied if the petitioner is "in custody under the conviction or sentence under attack at the time his petition is filed." *Maleng*, 490 U.S. at 490-91 (emphasis added). Thus, whether Sevayega was in custody pursuant to his 1993 conviction is irrelevant to determining whether he was in custody for purposes of deciding whether this court has jurisdiction to consider Sevayega's first ground for relief. The only relevant inquiry for that purpose is whether Sevayega was in custody pursuant to his designation as a sexual predator at the time he

filed his petition.

The Sixth Circuit has found that the disabilities resulting from a designation resulting from a designation as a sexual predator under Ohio law are insufficient to constitute custody pursuant to the habeas statute. *Leslie v. Randle*, 296 F. 3d 518, 523-24 (6th Cir. 2002). Sevayega cannot argue, therefore, that he was in custody pursuant to his designation as a sexual predator at the time he file his petition. Thus, this court is without jurisdiction to consider Sevayega's first ground for relief. For this reason the magistrate judge recommends that the court dismiss Sevayega's first ground for relief.

III

For the reasons given above the magistrate judge recommends that the court grant respondent's motion and dismiss Sevayega's petition.

Date: October 27, 2005

/s/Patricia A. Hemann
Patricia A. Hemann
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections without the specified time waives the right of appeal the District Court's order. See *United States v. Walters*, 638 F. 2d 947 (6th Cir. 1981). See also *Thomas v Arn*, 474 U.S. 140 (1985) reh'g denied, 474 U.S. 1111 (1986).

CHRONOLOGY

ERMA FIGUEROA VS. DR. REGINALD SEVAYEGA

7/28/92 Anne Bourgailly phoned to say that she had a student in her office who had a sexual harassment complaint against Dr. Reginald Sevayega. I spoke with a student by phone and made an appointment for her to come to the District Office to meet with me to discuss the situation. The meeting was scheduled for noon.

Noon I met with Ms. Erma Figueroa, who provided the following account of the behavior of Dr. Sevayega. According to Erma she had an evening class on Monday and Wednesday with Dr. Sevayega. He had initially been real helpful and prayed for her and she was new to the United States. She thought he was a good teacher and to his helpfulness turned to flirtatiousness. He began to make inappropriate comments and attempt to touch her in inappropriate ways. She told him repeatedly that she had a boyfriend and was not interested in him. She noted that he called her at home on several occasions and made sexually suggestive comments at which point she would again indicate that she was not interested and hang up..

Ms. Figueroa indicated that she was urged to complain about Dr. Sevayega after she reported to Anne Hawthorne that he obtained her up against the wall and kissed her in the hallway following class on Monday, July 27, 1992. She mentioned also that her boyfriend Douglas who was an attorney had also urged her to do something about his inappropriate behavior.

I advised Erma to contact Anne Bourjailly to have her place in a different class so that she would not have to deal with Sevayega anymore. Ms. Figueroa and expressed concern about being on campus with Sevayega.

At the time of our initial meeting Erma was not prepared to sign a formal complaint. She said that she would have her boyfriend prepare a statement, sign it and have it notarized within the next week.

I phoned Bourjailly to let her know the status of the complaint and to abide her to have Erma moved to another class.

Erma called later that day to say that Dr. Sevayega had called her at home in commented that he had seen her on campus. He made sexually lewd comments to her and she hung up the phone.

7/29/92 Anne Bourjailly phoned to say that she had placed Erma in another class , advised Sevayega of this and told him to leave her alone and to have no further contact.

I stayed In weekly contact with the student an attempted to have her come in and file a formal complaint. She indicated that she would, but never followed up.

During the week of August 15, 1992 Erma indicated that Sevayega had in fact raped her on or about July 20, 1992 on campus following her class (which was from 6-8: 30 on Monday and Wednesday). According to Erma she was walking through the hallway, Sevayega joined her and attempted to show her a shortcut to the parking lot. As they rounded a dark hallway he pushed her up against the wall, pushed their jeans down and attempted to rape her and did penetrate her vaginally. Erma said that she did not scream because she was afraid that he would hurt her. She fought with him and somehow got away. Ms. Figueroa stated that she had just told her boyfriend the truth about what happened and was planning to see a counselor at his suggestion. I recommended that you consider going to the rape crisis center and the police.

I explained to Erma than I could not proceed formerly until we have received a formal written complaint from her but based on this new information I would proceed informally and attempt to deal with the situation accordingly.

/s/ Kathryn M. Hall
Kathryn M. Hall
District Director
Affirmative Action, and Diversity.

September 11, 1992

CLEVELAND POLICE DEPARTMENT
OFFENSE/INCIDENT REPORT
DEPARARTMENTAL COPT(sic)

SERVICE NO. 92081310-01 VERSION 01 OF 2
ENTERED 10/30/92 PAGE 1
1540 HRS TERM DISTR
P7DA F2

TITLE: RAPE//CANCLE NAMED SUSPECT
REPORT DATE: 10/30/92 CLASS: 02341

TITLE RAPE/CANCEL NAMED SUSPECT
%%%%%%%%%
%%%%%%%%%

Entry by: MMZMAKE Completed: 92323 1121

CLEVELAND POLICE DEPARTMENT
OFFENSE/INCIDENT REPORT
DEPARARTMENTAL COPT(sic)

SERVICE NO. 92081310-01 VERSION 2 OF 2
ENTERED 10/30/92 PAGE 1
1540 HRS TERM DISTR
P7DA F2

TITLE: RAPE//CANCLE NAMED SUSPECT
REPORT DATE: 10/30/92 CLASS: 02341

TITLE RAPE/CANCEL NAMED SUSPECT
%%%%%%%%%
%%%%%%%%%

Entry by: MMZMAKE Completed: 92323 1121

SUPPLEMENTARY REPORT

Complaint No.
92081310

The victim stated that she told the suspect that she had a boyfriend and was not interested in the suspect.. The victim also said that the suspect had called her at home on the number of occasions in the sexual suggestive comments. The victim stated in which the suspect was called she would tell him that she was not interested and hang up on him.

The victim stated that she had reported what Dr. Sevayega was doing to Anne Hawthorne of the college after Dr. Sevayega entertain her against the wall and kissed her in the hallway after class on Monday 7/27/92. The victim stated that after she talked to her boyfriend and Ms. Hawthorne she made the complaint.

Ms. Hall stated that she advised the victim to contact Anne Bourjailly and get placed in a different class. The victim was not prepared to sign a formal complaint at this time.

Ms. Hall stated that she then phoned Ms. Bourjailly advised her to move the victim of an to another class.

Ms. Hall then wrote that the victim called her later in the day (See phone message dated 7/28/92.) The victim told Ms. Hall that the suspect had told her on the phone that he had seen her on campus. The suspect they may sexually lewd comments to her at which time the victim hung up the phone.

Ms. Hall noted that on 7/29/92 Anne Bourjailly phone (sic) to report that the victim had been placed in another

class, Ms. Bourjailly also stated that she had told Dr. Sevayega of the change and also told him to leave the victim alone.

Ms. Hall also noted that in the week of August 15, 1992 Irma indicated that the suspect had in fact raped her on or about 7/20/92 on the Metro campus following class. The victim told Ms. Hall said she was walking through the hallway when the suspect joined her and attempted to show her a shortcut to the parking lot. The victim stated that as they mounted a dark hall but suspect pushed up against the wall. The suspect and then pulled the victim's jeans down and vaginal (sic) raped her. The victims they did to Ms. Hall that she did not scream because she was afraid of the suspect. She further told Ms. Hall that she fought with the suspect and somehow was able to get away. (NOTE THIS IS THEN SAME STATEMENT THAT THE VICTIM MADE ON 8/28/92 TO CPD). The victim told Ms. Hall that she had told her boyfriend and was going to the police.

Also obtained from Ms. Hall, due to the Subpoena were notes from Anne Bourjailly. The notes indicate the following. 7/28/92 11:10 a.m. IRMA FIGUEROA. the note stated that the victim was in Philosophy M-W 6:00 to 8:30 pm. The victim had not been back to class since last monday. (sic) The notes indicate that the suspect was friendly and helpful at first. They also indicate that the suspect PLAYED WITH THE VICTIM'S MIND, kissed her and pinned her in the hallway. Thay (sic) indicate that the suspect waited for her after class and followed her. The victim told the suspect to stop. The victim told MS(sic) Bourjailly is at last week Monday (sic) a suspect in her against the wall and try to over jeans down. On a course that 8/5/92. The victim came in and stated that on 8/4/92 the suspect followed her in the parking lot.

(CONTINUED ON PAGE SIX)

Platoon Car Approved by

's' Mark C. Hastings 60 8174 /s/ Lt. Lt 11-18-92

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY,OHIO 255450

IRMA FIGUEROA 1045 Helmsdale Cleveland Hts., Ohio 44112 Plaintiff vs. REGINALD DELANO ANTONIO SEVAYEGA (AKA REGINALD D.. DOCKENS c/o Gerald T. McFaul,Sheriff 2nd Floor Justice Center Cleveland, Ohio 44113 and CUYAHOGA COMMUNITY COLLEGE DISTRICT c/o William F. Chinnock Statutory Agent 1219 Ontario Street Cleveland, Ohio 44113 JAMES M. PETRO Cuyahoga County Commiss County Administration Bldg. 1219 Ontario Street Cleveland, Ohio 44113	)	Case.: JUDITH KILBANE-KOCH JUDGE COMPLAINT (Jury Demand Endorsed Herein)

13. Defendant's further hired Sevayega without conducting an adequate background search of him which would have revealed that Sevayega presented any known risk of danger to the student population of CCC and that he was both unfit and not suitable to be employed as a member of the staff and/or faculty of CCC.

14. On or about July 20, 1992, Sevayega utilized his position of teacher and head of the Find Arts Department to lure Irma Figueroa into one of the lecture rooms on the CCC campus.

15. Their plans Sevayega sexually assaulted Irma Figueroa.

16. The acts and omissions of defendants as set forth herein above constitute a breach of the common duty owed to a plaintiff to, inter alia, provide a reasonably safe environment and faculty to her as a member of the student population of CCC.

17. Of the acts and omissions of the defendants as set forth above constitute a breach of the employment contract between CCC and Sevayega, which prohibited him from fraternizing and sexually harassing female members of the student membership of CCC. Plaintiff as a student of CCC was in on an intended third-party beneficiary of said contract was remains with and to control the custody of defendants and is therefore it is not affixed hereto.

18. As a direct and proximate result of the defendant's breach of contract, negligence and breach of duty, as set forth above, plaintiff sustained injuries including, but not limited to...

CALL & POST

By K.I. Pedizisai
Cal & Post Staff Writer

On Tuesday, December 29, a Cuyahoga Community College administrator and instructor was charged with the rape of a female student last summer in the Arts Building at the Metro Campus.

Reginald Sevayega, 55, of Cleveland is also charged with two counts of tampering with evidence. Police allege that the letters that Sevayega submitted in his alibi to prove that he was elsewhere. When the student was great, are genuine in their content, however, that the dates have been altered.

Sevayega heads CCC's Division of Finding an Professional Arts. He oversees 21 staff and faculty members at the Metal Campus. He has been with CCC sense of November 1989.

During the summer of 1992, a woman, 26, of Cleveland was enrolled in a philosophy class in which Sevayega was the instructor. The student alleges that in the classroom after the other students had left, say being raped her. After which she dropped out of the course. Sevayega maintains that his relationship was strictly professional, and denies any wrongdoing. He says that the female student drop the course because of excessive absences and a missed exam, the July 20 mid-term specifically. The alleged rape was not reported to CCC police, but to the Cleveland Police Department. At least several weeks after it occurred.

After being contacted about the charges, Cleveland Police Capt. Ed Henry report that Sevayega cooperated completely with police in their investigation. The letters that say me and present it to the detectives were genuine and their content, says

CPD Capt. Ed Henry, but the dates were crudely altered by Sevayega. Att, Alan Rossman, was contacted by Sevayega In October to represent him.

Sevayega's bond was set at $2,500, after he entered a not guilty plea before Judge Michael Gallagher of Cuyahoga County Court of Common Pleas on Tuesday, December 29. After the arraignment, CCC police say being at one and leave of absence with pay pending the resolution of the charges, said CCC spokesman Sandra Golden, Associate Vice President.

Directors of personnel at the University of Pittsburgh, and Youngstown State University, where he had been employed since then those charges of sexual misconduct were filed against India. While on staff. As of press time, a date for the pretrial had not been scheduled.